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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 733

FABRIC GARMENT CO., INC., and JOSEPH ABRAMS,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS FABRIC GARMENT CO., INC., AND JOSEPH ABRAMS.

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Statement.

We shall deal with certain aspects of the statement of facts of the United States contained in its brief at pages 3 through 15 in our argument. Here, we merely note two propositions:

(1) On the United States' own statement it is impossible that the wool serge sold by Abrams could have been Government-furnished property.* For the United States concedes this wool serge was delivered to Berman in January or February, 1951 (Brief, p. 4). But the Record shows that the second contract was not awarded until March 10, 1951 (Govt. Exh. 18), contrary to the assertion of the United States (Brief, p. 4) that it was awarded on February 20. And the so-called shortage on the first contract, which

* Surplus O. D. wool from World War II was a common article of private commerce in the years in question.

is the only one which was awarded prior to the end of February 1951, was only 4,974 yards (Petition, App. D, p. 59).

(2) The United States seeks by its statement to clothe the facts in the garb of conspiracy. To do so, it implies facts which the record refutes. For example, it asserts at page 5 of its brief that checks received from Alert in payment for the serge were deposited "in a bank account opened by Berman in Mayflower's name". The Record reference cited does not support the assertion that the account was opened "by Berman in Mayflower's name" nor the implication that it was opened for the purpose of receiving such payments. Indeed, the Record is perfectly clear that the bank account was opened by Mayflower, acting through its President, Berman, in 1950, long before the transactions involved in this case (R. 532).*

Argument.

We will adhere to the questions presented in our petition and discuss the response of the United States thereto.

QUESTION 1.

The brief for the United States confirms our assertion that the decision below conflicts with the decision in *Holland* v. *United States*, 348 U. S. 121, and related cases.

A. The purported distinction of the net worth cases found in the brief for the United States in fact renders them squarely applicable.

In seeking to distinguish the net worth cases, the brief for the United States unwittingly concedes their square

* References designated "R" are to Defendants-Appellants' appendix in the Court below.

applicability. The brief does not seek to sustain the validity of the distinction relied upon by the Court of Appeals. Instead it argues that

> "The accounting was not, as in the net worth tax cases relied upon by petitioners, made the primary proof of the crime charged, and hence those cases are not in point" (Brief, p. 16).

By indirection, the United States concedes that even in its view, where the "primary proof" consists of an accounting, the net worth cases apply. On this concession, this Court should grant *certiorari* on the first question presented.

For the petitioners were convicted on ten counts.* Eight of those ten charged the making of false statements that all of the wool furnished by the Government had been returned to the Quartermaster *or* transferred as authorized (four counts) and that only certain quantities of wool were "on hand" at the conclusion of each contract (four counts). A ninth count charged a conspiracy to make the false statements.**

The "primary proof"— indeed, the *only* proof—of the alleged falsity of the statements which is charged in the nine counts was the incomplete accounting (Govt. Exh. 177). And so, in substance, the jury was charged by the trial Court when it said:

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* The Court of Appeals reversed as to two of these.

** Proof of the alleged falsity of these statements was also an essential element on the tenth count charging sale, as our petition pointed out. Indeed, the brief for the United States, p. 6, plainly states that this proof supported the inference that the goods sold were Government property. And the Trial Judge, in denying the motion for a new trial noted that "These computations disclosed the shortage . . . which was claimed to have been the source of the 19,000 yards of serge which Abrams and Berman sold • • •" (R. 916).

"The fourth question is, was the statement false? Did it conceal in each case the retention of an amount of the O. D. serge?

"In that respect we get into this paper test. The Government claims that the records show the gross yardage sent to the contractor, to Fabric Garment Co., Inc.; that the paper test shows (2004) how many yards went into these garments, and that by the weight of the scrap returned they can compute the equivalent in yardage, and they claim that when that is all done there is a shortage, I think, of about 46,000 yards" (R. 666).

[The Court then summarized the defendants' contentions.]

"That is the broad outline of the controversy, and as to these charges, without suggesting that one thing is more important than another, that has been, in point of time consumed, *perhaps the principal issue underlying this controversy, whether these were true or false statements.*" (R. 666) (Emphasis Supplied)

Lest there be any question, in denying the petitioners' motion for a new trial, the trial Judge specifically held:

"The government's computation was as follows: As to each of four contracts involved, it added to the yards contained in the delivered jackets, the yards returned as scrap and the inventory reported by defendants as remaining at the conclusion of the contracts; the total of these amounts was then deducted from the total linear yards of serge delivered to defendants for the contracts. *These computations* disclosed the shortage of approximately 50,000 yards *which was the basis of the charge of filing false statements and which was claimed to have been the source of the 19,000 yards of serge which Abrams and Berman sold privately in August, 1951.*" (Emphasis supplied) (R. 916).

It follows that even if the argument made by the United States—that the net worth cases apply only when the accounting is the "primary proof" of the crime charged—is valid—which we very much doubt—the net worth cases are, on the Record in this case, squarely applicable.

B. The United States has conceded that its accounting was false, its chart was false, and the equation both declared was false.

In its brief to this Court, the United States argues that the accounting was not intended to prove any more than the amount of wool not returned to the Government (Brief, pp. 16-17) and that petitioners' criticism is premised upon attributing to the accounting a purpose it was not intended to serve—*i.e.*, proof of wool unaccounted for by evidence of lawful use, and therefore available for unlawful sale; proof of wool "on hand" when the inventory statements were made; and proof of wool not "returned or transferred as authorized" as the certificates of return stated.

If this is so, the proceedings below were based upon a false and misleading premise. The Government asserts that the accounting purported merely to show yardage "... furnished by the government under ... contract[s] which [was] not accounted for by the jackets and returned scrap" (Brief, p. 8). But the accounting, Government Exhibit 177, simply does not state what the United States says it states. For the accounting says the yardage was "unaccounted for *and* not returned", not "unaccounted for *by* return".

The exhibit, like the prosecutor's opening (quoted in our petition, p. 21), his Statement of Facts, his summation,

the testimony he tendered* and the Court's charge (quoted above, p. 4) all made the same assertion; all of them told the jury that non-return equaled shortage available for unlawful sale and proved the falsity of the statements.

The United States has now conceded that the account does not support such a premise. That knocks out the premise upon which the convictions were obtained. On that concession alone, *certiorari* should be granted.

Moreover, in order to sustain its assertion that the accounting had a limited purpose, the United States has been forced to attribute to the Record evidence which it does not contain. Thus it asserts that

> "There was direct evidence, however, to show . . . that the losses of scrap in incidental uses and sweepings could not possibly have been as much as the shortages" (Brief, p. 17).

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* The record is replete with assertions by the Government that the computations showed a shortage unaccounted for *by anything*. Thus, the Government's Statement of Facts (Appellee's Consolidated Appendix, p. 3a) which was given to defendants and the trial judge prior to trial states that the accounting "• • • shows Fabric Garment did not account for *or* return to the Quartermaster • • •" the allegedly missing wool.

And in introducing the Accounting Chart (Government Exhibit 177) the prosecutor asked:

> "Q. And did you compute the resulting shortage *which these figures show?* A. I believe that there is a schedule over here" (emphasis supplied) (R. 558).

And in his summation, the prosecutor stated:

> "What about all the mathematical computations that the chart showed? • • • And what did the computations finally come down to, giving them the maximum credit that they could get by using the paper test? They were short 4974 linear yards, 56 inches wide [on the first contract].
>
> "[On the second contract] they were short 25,819 yards.
>
> "On the third contract they were short 14,084 yards, and on the fourth contract, 1,574 yards" (Transcript, p. 1979).

If one fact is clear in this record it is that the United States repeatedly relied upon the figures in its accounting to prove shortage, falsity of the statements, withheld inventory and unlawful sale; not merely the amount of wool returned to the Quartermaster.

The Government is driven to this assertion as a justification of a gross violation of the *Holland* rules. This assertion cannot be supported.

There is, significantly, no Record reference to support the assertion and the only "evidence" which the United States could glean from this 2,000-page Record, which even remotely relates to the subject (Brief, p. 9), was a statement by one of its witnesses that 60,000 yards of wool were not used "in cleaning the machines"! (R. 333-34).* There is not a word in the trial Record as to how much wool went into the other, more significant, incidental uses.** The only evidence before any of the Courts which have considered this issue is that contained in the papers on the motion for a new trial. That evidence wholly refutes the United States' unsupported assertion that the amount of wool thus consumed was "small" or that it could not possibly have equalled the alleged shortage.***

C. The United States is unwilling to dispute the propriety of throwing away soiled scrap; its failure to dispute the clear showing that such action was authorized destroys the accounting and the convictions for making false statements.

The United States declines to dispute our clear showing that the contracts and the contracting officer authorized consumption of scrap and non-return of soiled scrap (see

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* The Brief for the United States, at p. 9, inaccurately characterizes the testimony of the witness, whose testimony is correctly described in our summary above.

** Moreover, the fact that 60,000 yards were not consumed is hardly relevant to prove that 46,000 yards were not so consumed.

*** Moreover, the Court of Appeals—and the United States—expressly rejected our contention, made below, that "* * * the burden was on the Government to prove the amount of wool which permissibly (as they assert) went into scrap but was never returned or accounted for" (Petition, App. p. 41). Now the United States says it met that burden.

Petition, pp. 12 to 14). The United States avoids the question by asserting in a footnote on page 9:

> ". . . It seems immaterial to the questions in this case whether the throwing away of such scrap was authorized or unauthorized."

This statement reveals another false premise which induced the jury verdicts. For the prosecution told the jury of laymen in summation:

> "The Contract clearly calls for a return of that material" (R. 655).

Indeed, this assertion was the sole pseudological justification for admitting the incomplete accounting into evidence, as the Court of Appeals recognized (Petition, App. A, pp. 42-43).

If the consumption and disposition of soiled scrap were authorized, as they plainly were, the convictions for filing false statements of inventory on hand, for filing false statements that the property was "returned and/or transferred as authorized" and for conspiracy to file false statements must be reversed, because the scrap was "transferred as authorized", it was not "on hand" when the statements of inventory were made, and the statements are not false.

D. If the United States is right about the limited purposes of its accounting, the net worth cases were nevertheless applicable and disregarded because the charge to the jury failed to reveal this allegedly limited purpose and the jury as well as the Courts below were grossly misled.

In *Holland* v. *United States*, 348 U. S. 121, at page 129, this Court said:

> "Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions

on which it rests, and the inferences available both for and against the accused."

Applying this rule, the Second Circuit, in *United States v. O'Connor*, 237 F. 2d 466 (2d Cir. 1956), said, at page 470:

"But regardless of the weight of evidence tending to show the guilt of the accused, in order to justify a conviction of tax evasion obtained through resort to the net worth method, it is imperative that the jury comprehend the complex theory involved and that it appreciate the relevance of the evidence introduced in the application of that theory."

Accordingly, if the United States desires to use the accounting device for a "limited purpose", as it now suggests it intended below, the net worth cases nevertheless apply to require the limited purpose to be disclosed to the jury.

In the case at bar, the first disclosure of such a limited purpose came in the United States Supreme Court. There was no explanation of this limited purpose to the jury, to the defendants, or to the Courts below.

It follows, again, that the net worth cases were applicable and violated.

* * * * * * *

The United States has now had two years in which to suggest a tenable reason why the net worth cases are inapplicable in this case. The distinction suggested by it in its brief to the Court of Appeals was rejected by that Court, which came up with its own different distinction. That distinction, in turn, was rejected by the United States in its brief in this Court when it came up with a new and different distinction. That distinction, in turn, is equally invalid, and wholly incapable of administration, especially since it seems to depend upon the Court before which the Government is arguing as to whether the proof is primary or secondary.

In any event the United States has conceded that to the extent that the accounting was the primary proof of the crime charged the net worth cases are applicable. On this concession alone the convictions on seven of the eight counts which remain in this case should be reversed summarily, and the questions presented concerning the applicability of the net worth cases should be resolved by this Court.

QUESTION 2.

The rules of the *Jencks* case were violated in the case at bar.

The United States seeks to avoid the *Jencks* question by distorting the record and by the unsupported assertion that the question is moot.

First, the United States asserts that the trial Judge did not "flatly" reject defense counsel's request for the affidavit but only decided to hold the affidavit they requested "for the time being" (Brief, p. 21). This assertion is a distortion of the Record. For the Record is clear that the Court was requested to give defense counsel the affidavits and that he said:

> "There are two documents here, one dated the 10th of March, 1953, and one dated the 13th of March, 1953, and I am going to give counsel the one dated the 10th of March, 1953. The other one does not relate to the testimony of this witness as far as I can tell" (R. 407).
>
> "The 13th of March, 1953, is the one that I am withholding" (R. 407).

Notwithstanding this flat statement, colloquy continued. It is true the defense counsel did not follow the pattern established by defense counsel in *United States* v. *Dennis*, 183 F. 2d 201, aff'd 341 U. S. 494 (1951), where a ruling

by trial Judge Medina merely became the stimulus for further objections, arguments, motions and demands. We doubt, however, that the United States seriously urges that defense counsel are under an obligation to engage in such tactics. In the case at bar they made their request; the trial Judge "flatly" ruled that he was withholding the affidavit. Defense counsel were, we submit, under no obligation to go farther in order to attempt to persuade the trial Court of its error.

Moreover, the colloquy about "withholding it for the time being", upon which the United States relies, related not to delivering the affidavit to defense counsel but to *marking it as an exhibit for identification!* The following transpired:

> "Mr. Polakoff: We could have them both marked for identification?
>
> "The Court: Just mark that one that I referred to.
>
> (Marked Defendant's Exhibit 167 for identification.)
>
> "Mr. Polakoff: Will your Honor mark the other one?
>
> "The Court: As a matter of fact, you do (1046-A) not have it, do you? We can hold it for the time being" (R. 408-9).

The "time being" was short. For after one more exchange the Court decided to mark the other affidavit, saying:

> "Mark this other one Court's Exhibit I. There are two pages on that" (R. 409).

Next, the United States suggests that in some way "the whole matter became moot when it developed that the 1953 paper patterns had been taken from the wrong master patterns" (Brief, p. 21). This suggestion is specious.

The witness Strykower returned to the stand and testified at great length concerning both the earlier and later tests. The Government relied heavily upon his credibility and upon the integrity of the tests which he allegedly conducted in order to secure a conviction. We are baffled as to how his credibility or the integrity of his tests could possibly be deemed to be moot on this record.

Moreover, if one thing is clear from the record it is that the withheld affidavit did *not* relate to the 1953 paper patterns, as the United States erroneously suggests when it says the "matter" is "moot". Indeed, in withholding the affidavit from defense counsel, the Court said that he was giving defense counsel "anything that has a bearing on those patterns that were made up" (R. 407). It follows that the affidavit, according to the trial Judge, did *not* relate to the 1953 paper patterns but to something else.

The trial Judge withheld the affidavit on the basis of his *in camera* inspection, the affidavit did touch upon "the evidence and activities as to which [the witness] testified at the trial" (*Jencks* v. *United States*, 335 U. S. at 668), and the witness' credibility and the integrity of his tests remained a very substantial issue in this case. Only by imposing a novel and unjustifiable burden upon defense counsel or by reintroducing the rule requiring exceptions can it be suggested that the ruling of the trial Court did not violate *Jencks*.

QUESTION 3.

Petitioners were denied the right of cross examination.

The United States seeks to dispose of Question 3—the denial of the right to cross examine—by attempting to treat it as a failure of proof—not as a denial of cross examination (Brief, p. 18, footnote).

The United States overlooks the crucial fact that the United States Attorney himself did the testifying. He attempted to supply the missing link in the chain of proof which would make the paper test admissible and he was the witness who could not be cross examined.

As to this the United States says nothing.

Instead, it seeks to accord to the word "exactly" a meaning which it simply will not bear. For the United States asserts that the missing link between the paper test and the area of wool contained in the jackets was supplied by the testimony of a cutter that the jackets were cut "exactly the same as the pattern" (Brief, p. 7).

But the Record is clear that the word "exactly" when used by a cutter is insufficient to bridge the gap which the prosecutor himself filled. For the Record is undisputed that "exactly", when used by a cutter, may or may not mean that the parts of the jackets correspond with precision to the patterns. Indeed, the Government witness Strykower repeatedly testified that in the original paper test he cut the paper parts "exactly" according to the patterns (R. 398, 399, 404, 468-69, 364, 385). Yet it is conceded that the parts differed from the patterns by ¼ to 3/16 of an inch. And even the testimony upon which the United States relies—that of Schneider—shows that "exactly" did not mean precise correspondence to the pat-

terns. For after testifying that he cut "exactly" according to the patterns, Schneider went on to testify to differences between the patterns and the cut parts (R. 285-289; 317).

The adverb "exactly" is in itself a thin reed upon which to rest the validity of a complicated and purportedly scientific test. It is especially weak when used by a cutter to describe the high-tension factory operation in which he was engaged. At the trial, it did not purport to establish the essential link between the area of paper and the area of wool.

The fact remains that the only link between paper and wool was supplied by the unsworn and un-cross-examined statement of the prosecutor in the opening.

Miscellaneous.

In an attempt to find some justification for the outrageous testimony of witness Cooper which set the stage for this cloak-and-dagger trial of paper and wool and FBI chases, the United States cleverly suggests in a footnote on page 5 of its brief that Cooper was called because the initial report that Alert was selling wool "probably came" from Cooper. Of course, the Record nowhere supports this speculation, and Cooper's testimony remains totally unconnected to the issues in this case, highly prejudicial and grossly improper.

Conclusion.

The contradictions between the positions taken by the United States here and the positions it took in the Courts below, the concessions to which it has been forced, its dis-

regard of seven of the eight convictions remaining in this case, and the failure of the Record to support its present arguments are all symptoms of the grave violations of appropriate standards for the protection of defendants in criminal cases which took place below.

If ever a case called for the exercise by this Court of its power of supervision, it is this one. The petition should be granted.

Dated: New York, N. Y.
May 5, 1959.

Respectfully submitted,

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